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No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

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MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

Defendant State of North Carolina hereby moves to dismiss the claims of plaintiff Southeast Interstate Low-Level Radioactive Waste Commission ("Commission") for lack of jurisdiction and for failure to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(1), 12(b)(6), for the reasons stated herein. As elaborated below, the claims of the Commission against North Carolina – including but not limited to the claims against the State's treasury for money damages – are barred by the Eleventh Amendment and by the principles of sovereign immunity embodied in that Amendment.

INTRODUCTION AND BACKGROUND

This is an original action against the State of North Carolina for money damages and declaratory relief. The complaint alleges that North Carolina breached the obligations of the Southeast Interstate Low-Level Radioactive Waste Management Compact ("Compact"), an interstate compact between North Carolina and the plaintiff States of Alabama, Florida, Tennessee, and Virginia, as well as Georgia and Mississippi, neither of whom are plaintiffs in this action. The complaint does not allege that the Commission is a party to the Compact; nevertheless, the Commission itself is a named party-plaintiff.

The first time this complaint was submitted to this Court, none of the States was a named plaintiff. Instead the Commission alone moved for leave to file. In response to this Court's request for the views of the United States, the Solicitor General argued that leave should be denied because "[t]he Commission itself is plainly not a State," and "therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive original jurisdiction." U.S. Br., No. 131, Orig., at 8. Further, the Solicitor General explained, "a

suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment." *Id.* at 13.

After receipt of the Solicitor General's brief, this Court denied leave to file. *See* Mot. for Leave to File, No. 132, Orig., at 1 ("This Court denied the initial motion after requesting and receiving from the United States an *amicus* brief that expressed the view that this Court did not have exclusive original jurisdiction over a suit filed *solely* by the Commission against a member State of the Compact."). In response, four of the States themselves, in addition to the Commission, sought leave to file the instant complaint. When this Court again requested the views of the United States, the Solicitor General urged that leave be granted, on the ground that, unlike in No. 131, Original, this time the "moving States are . . . asserting their *own* rights under the Southeast Compact." U.S. Br., No. 132, Orig., at 11. The plaintiffs responded that they were in "complete accord" with that analysis, Plaintiffs' Supp. Br., No. 132, Orig., at 1, and this Court granted leave to file.

Thus the addition of the States as plaintiffs has apparently resolved the question whether this Court has exclusive original jurisdiction over this action, but the continued inclusion of the Commission as a distinct plaintiff in this action now places squarely before this Court the question posed by the Solicitor General in No. 131, Original – *viz.*, whether a suit by a Compact Clause entity against a State is barred by the principles of sovereign immunity embodied in the Eleventh Amendment. The answer is yes. Although this Court in a handful of cases has allowed parties whose own claims would be barred to intervene as plaintiffs in actions brought by parties with viable claims – i.e., the United States or sister States – those precedents do not control here for several reasons. Accordingly, the claims of the Commission should be dismissed.

ARGUMENT

The Eleventh Amendment applies to original actions in this Court, barring suit against an unconsenting State unless the suit is brought by a plaintiff against whom the State cannot assert sovereign immunity. *See Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). Although the Eleventh Amendment by its own terms bars only suits against States by citizens other States, it is by now settled that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit." *Alden v. Maine*, 527 U.S. 706, 736 (1999). In addition to diversity suits, States are constitutionally immune from suits by foreign nations, *see Monaco*, *supra*, by federal corporations, *see Smith v. Reeves*, 178 U.S. 436 (1900), and by Indian tribes, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).[1]

This Court's precedents have recognized *only* two types of suits against which a State may not invoke constitutional immunity: a suit by the United States, *see United States v. Texas*, 143 U.S. 621 (1892), and a suit by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286 (1904). Even as to those types of suits, the general understanding is that the States actually *have* consented to suit, albeit not in the individual case, but more broadly in the plan of the Convention that underlies our constitutional structure. *See Alden*, 527 U.S. at 755 ("The States have consented . . . to some

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[1] Even if one regards the immunity recognized in these decisions as only a common-law immunity from suit by any non-federal, non-State entity, subject to abrogation by Congress, *see, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 130-42 (1996) (Souter, J., dissenting); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 700 (1999) (Breyer, J., dissenting), that immunity would extend to suit by the Commission, because the Commission is a non-federal, non-State entity, and North Carolina's immunity from suit has not been abrogated by Congress, *see infra* note 3.

suits pursuant to the plan of the Convention or subsequent constitutional amendments. In ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government."); *Monaco*, 292 U.S. at 328 ("With respect to . . . controversies [between the States], the States by the adoption of the Constitution, acting in their highest sovereign capacity, in the convention of the people, waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established by their own consent and delegated authority as a necessary feature of the formation of a more perfect Union." (internal quotation marks omitted)).

A. North Carolina Is Immune From Suit By the Commission, Absent Abrogation Or Consent, Because The Commission Is Not The United States Or A State

While the claims brought by the individual member States may be allowed under the Constitution, North Carolina remains entitled to assert sovereign immunity from the claims asserted by the Commission itself. The Commission obviously is not the United States; it just as plainly is not a State either. That conclusion is implicit in this Court's decision to deny the Commission leave to file the complaint in No. 131, Original. In addition, this Court has twice held that a Compact Clause entity is not a State "for Eleventh Amendment purposes" when the entity sought to cloak itself in the immunity of its member States. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994); *see also Lake Country Estates, Inc. v. Tahoe Reg. Planning Agency*, 440 U.S. 391, 401-02 (1979). It is difficult to see why it should be otherwise when the entity seeks to overcome the constitutional immunity of a genuine, sovereign State.

As the Solicitor General has explained:

> The Commission itself plainly is not a State, and should not be treated as one for present purposes. . . .

> "The States, as separate sovereigns, are the constituent elements of the Union." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). The Commission, by contrast, is an interstate body created by the Compact. The Commission exists solely for the purposes of administering the Compact.

U.S. Br., No. 131, Orig., at 8. And:

> The States may, with Congress's consent, create Compact Clause entities. But those entities "occupy a significantly different position in our federal system than do the States themselves." *Hess*, 513 U.S. at 40. Compact Clause entities lack the normal attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction.

Id. at 11.

Finally, while it is clear enough that Compact Clause entities are not normally considered to be States, it is even more clear that *this* Compact Clause entity would not be a State even were the rule to admit of some exception. The Compact itself unambiguously defines the Commission as "a legal entity *separate and distinct* from the party states" and explicitly provides that the Commission's liabilities "shall not be deemed to be liabilities of the party states." Compact, Art. 4(M)(1), Br. in Opp. App. 17a (emphasis added).

In sum, if the Commission has "no inherent right to invoke this Court's original jurisdiction in the way one of the States might do," as the United States argued (U.S. Br. 11) and as this Court evidently agreed, then it also has no inherent right to overcome North Carolina's sovereign immunity from suit "in the way one of the States might do."

B. North Carolina Has Not Waived Its Immunity From Suit By The Commission

If North Carolina is entitled to constitutional immunity from claims by the Commission itself, the Commission can proceed in this Court with its own claims against the State only if North Carolina waived its immunity from suit by the Commission. It has not.

"The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The waiver must be "unequivocal," *id.*, evidenced either by "the most express language," *id.* at 240 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), or by litigation conduct – such as removal by the State itself to federal court – that expresses the State's acceptance of federal jurisdiction with equal "clarity," *see Lapides v. Board of Regents*, 535 U.S. 613, 620 (2002); *see generally College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676, 678 (1999). Neither form of waiver exists here. There certainly has been no express waiver, and at every stage of the litigation North Carolina has consistently and vigorously opposed the assertion of jurisdiction by this Court over the Commission's claims.[2]

Nor can the Commission derive any tacit waiver of immunity – much less a clear and unequivocal waiver – from

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[2] North Carolina has suggested that the State might consent to be sued in its own courts, *e.g.*, Br. in Opp. 24, but it is perfectly well settled that "a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation." *College Savings Bank*, 527 U.S. at 676; *see Atascadero*, 473 U.S. at 241 ("in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court"); *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam); *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

the terms of the Compact itself. Far from expressing the required "unequivocal waiver specifically applicable to federal-court jurisdiction," *Atascadero*, 473 U.S. at 241, the Compact says not one word about any member State's acquiescence to *any* suit by the Commission in *any* court, federal or otherwise. Absent a clear and unequivocal waiver of its immunity, North Carolina remains immune from suit in this Court by the Commission.[3]

C. The Commission Cannot Ride "Piggy Back" On The Claims Of The States

Finally, the Commission might try to rest its right to sue North Carolina on the argument that North Carolina may not assert immunity from suit by the Commission once other plaintiffs – the member States – have already properly invoked this Court's jurisdiction. This argument should be rejected.

The existence of plaintiff States with jurisdictionally proper claims does not strip North Carolina of its immunity from the claims of the Commission. "A federal court must examine *each claim* in a case to see if the court's jurisdiction

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[3] Even if North Carolina's immunity from suit were only a common-law immunity subject to abrogation by Congress, *see supra* note 1, there has been no abrogation of immunity here. Like a waiver, "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987). The Compact contains no abrogation language of any kind, much less unmistakably clear abrogation language. The Compact says only that *the Commission* can appear in "any court of law," Compact, Art. IV(e)(10), Br. in Opp. App. 14a, which of course says nothing about whether any *State* may be subjected to suit in federal court. *See Welch*, *supra* (statement that "any seaman" can sue in federal court does not abrogate States' immunity from federal suit by seamen); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973) (statement that suit could be brought in "any court of competent jurisdiction" does not abrogate States' immunity from suit).

over *that claim* is barred by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("*Pennhurst II*") (emphasis added). In *Pennhurst II*, private-party plaintiffs were seeking to establish federal jurisdiction over claims against an unconsenting State for violations of state law. The United States was also a plaintiff in the action. The private plaintiffs argued that their claims should be able to proceed despite the Eleventh Amendment because the State was not immune from the claims of the United States. The Court dismissed this argument out of hand:

> We . . . do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court . . . the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.

Id. at 103 n.12. Likewise, here, the presence of the "moving States" for the permissible purpose of "asserting their *own* rights under the Southeast Compact," U.S. Br., No. 132, Orig., at 11, does not eliminate North Carolina's immunity for all purposes, such that it *also* must be subjected to the distinct claim of a non-sovereign, non-State, non-elected body to $80 million (plus interest and attorney fees) from the pockets of North Carolina's residents.

It is true that the Court in the past has allowed non-State, non-federal parties to intervene as plaintiffs in original actions against nonconsenting States when the United States was already a plaintiff in the action. *See Arizona v. California*, 460 U.S. 605, 614 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). The decision to allow intervention in each case was premised on a kind of "harmless jurisdictional error" theory: once the State was already subject to the Court's subject-matter jurisdiction because of the pres-

ence of the United States, it was considered no real additional burden on the State to force it to defend against claims from which it would normally be immune. Thus the *Arizona* Court, allowing the claim of Indian tribes to proceed despite an asserted Eleventh Amendment bar, reasoned as follows:

> The Tribes do not seek to bring new claims or issues against the States, but only ask for leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore our judicial power over the controversy is not enlarged by granting leave to intervene, and the states' sovereign immunity protected by the Eleventh Amendment is not compromised.

460 U.S. at 614. The *Maryland* Court offered little by way of explanation for overriding Eleventh Amendment immunity other than a cite to *Oklahoma v. Texas*, 258 U.S. 574, 582 (1922), in which Eleventh Amendment immunity does not appear to have been asserted, and a "*cf.*" cite to a private civil case involving intervention where it would cause the defendant "relatively little additional burden," *Trbovich v. Mine Workers*, 404 U.S. 528, 536 (1972).[4]

Importantly, none of these precedents was mentioned by the Court in *Pennhurst II* when it later rejected an effort to bootstrap barred private claims onto the claims of the United

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[4] *Oklahoma* does not discuss Eleventh Amendment immunity, but in explaining why private parties in the case should be allowed to intervene in the original action, it posits a theory of "ancillary" jurisdiction that is essentially the mirror opposite of "no enlargement" theory offered in *Arizona*: whereas the *Arizona* Court assumed that the addition of otherwise-barred claims would *not* enlarge this Court's jurisdiction once the United States has already properly invoked it, the *Oklahoma* Court assumed that allowing private claims to proceed *would* enlarge the Court's jurisdiction, but that such enlargement was permissible because the new jurisdiction was "ancillary" to its original jurisdiction over the claims of the United States and of sister States. *See* 258 U.S. at 581-82.

States. Neither do they justify the Commission's similar effort to bootstrap its claims here.

First, subjecting North Carolina to the claims of the Commission would not be the same kind of "harmless jurisdictional error" involved in the earlier cases because the Commission, unlike the intervening parties in the prior decisions, is demanding relief different in quantity and quality from the relief sought by the jurisdictionally proper parties. In the pre-*Pennhurst II* cases, it appears that the intervening plaintiffs were seeking relief that did not materially differ in kind or amount from the relief already being sought by the United States. In *Arizona*, the intervening Indian tribes were already fully and adequately represented in their water rights claims by the United States acting as a fiduciary to the tribes; the Indian tribes intervened only to reiterate their rights on their own behalf. *See* 460 U.S. at 614, 627. The intervening parties in *Maryland* were pipeline companies seeking tax refunds, but it is "far from clear whether it was contemplated that the pipeline companies would be permitted to pursue their individual refund claims within the framework of the action." Wright et al., *Federal Practice & Procedure* § 4045, at 205-06 n.31 (2d ed. 1988).

Here, by contrast, it could not be more clear that the Commission seeks a form of relief substantially different from that which the States could seek on their own. As the Commission itself has carefully explained to this Court:

> Although any of the member States could seek a declaratory judgment from this Court that North Carolina violated the terms of the Compact, *only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.*

Commission Supp. Br., No. 131, Orig., at 5-6 (emphasis added). In contrast to the relief Commission would seek, the Commission has insisted, "the States could sue *only to re-*

coup their out-of-pocket costs, a *small fraction of the total funds that North Carolina received from the Commission*, which were generated from fees levied by the Commission on users of the South Carolina waste facility." *Id.* at 6 (emphasis added); *see id.* at 7-8 (arguing that suit by a member State would not be provide an adequate remedy "because there is no significant monetary recovery available to that State from this Court"). The Solicitor General wholly agreed with that analysis:

> The Commission's sanction requires North Carolina to return nearly $80 million (plus interest) *to the Commission. The Commission is not suing North Carolina to recoup funds that are owed to the other States.* Indeed, the Commission – and not the States that are parties to the Compact – [disbursed] the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility.

U.S. Br., No. 131, Orig., at 16-17 (emphasis added).

There is thus no genuine dispute that recovery of the $80 million "sanction" is relief *only* the Commission can seek as plaintiff – no State can claim (or has claimed) any independent entitlement to those funds, which were paid to North Carolina by the Commission out of disposal fees levied on *private* users. To be sure, the Court's grant of leave to file the Complaint in this case implicitly recognizes the States' entitlement to "assert[] their *own* rights under the Southeast Compact," U.S. Br., No. 132, Orig., at 11, and they are indeed now free to try to prove their *own* claims based on the alleged violation of their *own* "rights" under the Compact. But nothing in the complaint alleges or even suggests that the States themselves suffered the loss of $80 million or are entitled to restitution in that amount. Each Count of the Complaint asserts only that generally "the Plaintiffs" suffered losses or are entitled to restitution, including the $80

million. That general allegation, however, is consistent with what the Commission and the Solicitor General have said from the outset: the Commission (and only the Commission) suffered the loss of $80 million, while the States suffered *other* "out-of-pocket" losses, which together comprise the collective losses suffered by "the Plaintiffs." It would be frivolous – and irreconcilable with the Commission's previous arguments before this Court – for the plaintiff States now to read their Complaint as asserting losses to the States *themselves* in the amount of the $80 million paid out by *the Commission* from *private user fees*.

The relief the Commission seeks in this action is thus not only wildly out of proportion to the relief the States seek, it is also different in kind: the recovery the Commission seeks is essentially restitution of money paid; whatever else the States themselves may try to show as damages, they cannot seek anything like *restitution*, as the other States never had an ownership interest in the money themselves in the first place. *See Korea Supply Co. v. Lockheed Martin Co.*, 63 P.3d 937, 947 (Cal. 2003) ("The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."); *Restatement of Restitution* § 1, comment a (1937) ("A person obtains restitution when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money."); *Restatement (Second) of Contracts* § 370, comment a (1981) ("A party's restitution interest is his interest in having restored to him any benefit that he has conferred on the other party. . . . Restitution is, therefore, only to the extent that he has conferred a benefit on the other party. . . . The benefit must have been conferred by the party claiming restitution."). For this reason the Commission is not a mere tag-a-long party in a case otherwise properly before this Court. If the Commission cannot make its own claim for restitution from North Carolina's treasury, this case will be about a very different kind

of damage, *viz.*, whatever direct losses to the States that they are able to allege and establish. Accordingly, even assuming it is correct to say that because a State lacks immunity from suit by one party, it is stripped of its immunity from suit by all others with substantially the same claim, here the claims are not substantially the same.

Second, and more broadly, the pre-*Pennhurst II* decisions allowing non-federal, non-State parties to proceed with claims against nonconsenting States appear to have rested on a narrow conception of the Eleventh Amendment as governing only the exercise of this Court's subject-matter jurisdiction. Once that jurisdiction is properly invoked, the reasoning suggests, the Eleventh Amendment serves no function and the immunity it embodies ceases to operate. That view cannot be reconciled with the long line of cases recognizing that the Eleventh Amendment is not solely about the exercise of the federal judicial power, but embodies a more fundamental sovereign immunity from suit in all courts against all claims by all non-federal, non-State parties, unless there is a valid waiver or abrogation of immunity.

As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall explained that the Eleventh Amendment is premised not so much on the indignity of subjecting a State to suit in *federal court*, but on the indignity of being subjected to suit by *monetary creditors* who – like the Commission here – are *not* sister States, *id.* at 406-07.

More recently, the Court's holding in *Alden v. Maine*, that the sovereign immunity at the core of the Eleventh Amendment extends to suit in state as well as federal courts, firmly establishes that the Eleventh Amendment implicates more than just the exercise of federal judicial power over a State. The "States' immunity from suit is a fundamental aspect of the[ir] sovereignty," the Court explained, and it "neither derives from, *nor is limited by*, the terms of the Eleventh Amendment." 527 U.S. at 713 (emphasis added).

> While the constitutional principle of sovereign immunity does pose a bar to federal jurisdiction over nonconsenting States, this is not the only structural basis of sovereign immunity implicit in the constitutional design. Rather, there is also the postulate that the States of the Union, still possessing the attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention. This separate and distinct structural principle is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution.

527 U.S. at 730 (internal quotation marks, citations and alterations omitted). The Eleventh Amendment, in other words, is not only a limitation on this Court's jurisdiction (though it is at least that), but also an expression of the State's sovereign right to decide when and where and by whom it may be sued.

It is not just *Alden v. Maine* that recognizes this fundamental point. Indeed, one does not even have to accept *Alden*'s basic holding that Congress may not abrogate a state's immunity from suit in her own courts, *see, e.g.*, *Alden*, 527 U.S. at 760 (Souter, J., dissenting), to accept that a State is immune from suit in *any* court absent her consent at least as a matter of common law, unless Congress validly abrogates her immunity, *see id.* at 798; *College Savings Bank*, 527 U.S. at 700 (Breyer, J., dissenting) ("Sovereign immunity is a common-law doctrine . . . permitting Congress to narrow or abolish state sovereignty where necessary."); *supra* note 1. Thus, although the scope of Eleventh Amendment immunity has been vigorously disputed in this Court's recent opinions, the Court has been unanimously of the view that, at least barring a valid abrogation, the Amendment "grants the State a legal power to assert a sovereign immunity defense should it choose to do so." *Wiscon-*

sin Dep't of Corrections v. Schacht, 524 U.S. 381, 389 (1998); *see Hess*, 513 U.S. at 39 ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."); *see also Briscoe v. President & Dirs. of Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to sued without her consent."). Because there has been no abrogation here, *see supra* note 3, the limits of North Carolina's immunity from suit by non-federal, non-State entities are defined by her own consent – not by the assertion of this Court's jurisdiction.[5]

The Court has "long recognized that a State's sovereign immunity is 'a *personal privilege* which it may waive at pleasure.'" *College Savings Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)) (emphasis added). Thus a State may waive its immunity from suit in state court but not federal, *see id.* at 676, and a State may waive its immunity from suit by persons bringing state-law claims but not analogous federal claims, *see Alden*, 527 U.S. at 758. To the extent that a State chooses "to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." *Id.* This Court has never held that a State's consent to one class of claims automatically waives its immunity from all others, such that barred claims may ride piggy-back on permitted claims. To so hold would obviously nullify the

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[5] It is true, as the United States has observed, that the presence of the Commission does not deprive this Court of original jurisdiction over this action. U.S. Br., No. 132, Orig., at 12. But it does not follow that the Court therefore has jurisdiction over the claims of all parties, including the Commission. *Schacht* holds squarely to the contrary: the presence of an Eleventh Amendment-barred claim does not destroy a federal court's "original jurisdiction" over the action for purposes of removal, but it does require that the barred claim be dismissed. 524 U.S. at 389.

State's constitutional (or common-law) privilege to decide when it will consent to be sued.

The same principle should apply here. Indeed, this Court's cases have made clear that the States' amenability to suits in this Court by the United States and by sister States is nothing more than a form of structural waiver – the States implicitly consented to such suits, and only such suits, in the plan of the convention. *See supra* at 3-4. To say that the invocation of this Court's jurisdiction by the United States or a sister State automatically opens the door to private claims against a State contradicts the structural consent reflected in the plan of the convention.

Beyond the two kinds of suit specifically contemplated in the founding era, this Court made clear in *College Savings Bank* that there are *only* "two circumstances" in which a State may be subjected to suit in federal court: when Congress validly abrogates the State's immunity, and when the State waives its immunity. 527 U.S. at 670. There has been no abrogation by Congress and no waiver by North Carolina here. *College Savings Bank* says nothing about a "third circumstance," i.e., when the State is already being sued by the United States or by other States. It follows that even if the moving States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until North Carolina consents to such suit. It has not done so.

CONCLUSION

For the foregoing reasons, the motion to dismiss the claims of the Commission should be granted.

Respectfully submitted,

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